No. 94-1989

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LITTON SYSTEMS, INC.,

Petitioner,

v.

MARTHA CARROLL; JAMES CARROLL; ROSETTA EDWINA ROGERS; JAMES CARROLL, JR.; KEITH S. GENTLE; BELINDA GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; RANDY GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; FRED ALLEN CHAMBERS, individually and as next friend and parent of Rusty Chambers, a minor; DEBBIE CHAMBERS, individually and as next friend and parent of Rusty Chambers, a minor; BARBARA MESSER; ANCY SIMONDS, individually and as next friend and parent of Jennifer Simonds, a minor; JAMES GREEN; MARVIN GARRETT; KENNY GREEN; PEGGY GREEN; SANDRA HANCOCK, individually and as next friend and parent of Chuck Hancock, a minor; JAMES R. MESSER, individually and as next friend and parent of Jonathan Messer, a minor; MELANIE MESSER, individually and as next friend and parent of Jonathan Messer, a minor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case arises out of the Defendant's pollution of the groundwater at its Clifton Precision plant in Murphy, North Carolina that was built in 1967. The Plaintiffs are individuals who drank from three residential groundwater wells on property directly adjacent to the Defendant's plant, the first of which was dug in 1969.

The pollution became public in January, 1987 when the health department announced that all three of the Plaintiffs' wells (along with others in the community) contained levels of chlorinated solvents that exceeded EPA drinking water standards.[1] One chemical that was consistently detected was Trichloroethylene (TCE), a degreasing agent the Defendant states had not been used in processes of the plant since 1974. The Defendant signed a Consent Agreement with the EPA and pursuant to that agreement continued to test Plaintiffs' wells. The chemical Trichloroethylene (TCE) was repeatedly detected in Plaintiffs' wells in numerous tests. For purposes of the motions that are the subject of appeal, it was not contested by Defendant that the contamination in Plaintiffs' wells came from Defendant's plant (AR. 1425). It was also undisputed that Defendant supplied bottled

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[1] Two additional families sought to join this action in 1989, but their motion was denied. Additional actions were filed by these families in January, 1990 as *Hembree v. Litton Indust., Inc.* (Docket No. B-C-90-6) and *Ramsey v. Litton Industries* (Docket No. B-C-90-5) (property claim only). Each of these cases proceeded on different scheduling tracks, with *Ramsey* having completed discovery and motions for summary judgment were pending at the time *Carroll* was dismissed. Both actions were stayed pending the outcome of the *Carroll* appeal.

water to the Plaintiffs for many months (and later installed special carbon filters on each well) because Plaintiffs' well water had been determined to contain chemical contamination above the maximum contaminant level (MCL) established by the EPA. It was undisputed that the MCL for TCE is 5 ppb and that the Health Department notice to a well owner contains notification of this fact and further warns the well owner that a contamination level of 14.3 ppb is "significant contamination" that renders the water unfit for drinking or cooking and to avoid prolonged bathing or showering in the water (AR. 1523). At the level of 14.3 ppb the well owner is also warned "levels of this compound are about three (3) times the EPA MCL. Continued consumption may lead to an increased long term health risk" (AR. 1523). It was undisputed that water from the wells utilized by these Plaintiffs all tested for TCE at or above 14.3 ppb and some testing went as high as 84 ppb (AR. 1523).[2]

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[2] Defendant has mischaracterized the evidentiary record as reviewed by the Fourth Circuit by stating in its Statement of the Case at page 3 that after pollution was discovered, Petitioner tested Plaintiffs' wells " . . . and found extremely low concentrations of TCE." Elsewhere the Defendant has referred to the "insignificant levels" of TCE found in Plaintiffs' wells. The Fourth Circuit accepted the Defendant's use of *average* concentrations in its recounting of the facts about concentrations (App. 3a-4a) but made no characterization of the levels as being "extremely low" or "insignificant." On the contrary, the Appellate Court found the fact that the average contamination in the Carroll well was four times the MCL was so significant that "this evidence alone" would prevent entry of summary judgment on Plaintiffs' nuisance and trespass claims (App. 13a). *See* also note 5 *infra* regarding the use of average concentrations.

The Plaintiffs presented testimony that they could not use the water from their wells, had to haul in bottled water, could not grow a garden as they had before, were afraid to use the water, and that their property was worthless because of the contamination (See e.g. AR. 1038-39). Plaintiffs also presented testimony from a real estate expert that contaminated property in the Murphy area has lost its marketability to the general public (AR. 1569, 1573-75) and from a former bank president in the Murphy area that a prudent lender would not be prepared to lend money on property noted to be polluted (AR. 1578-79, 1580-82, 1588).

Extensive medical records going back thirty years or more on these Plaintiffs were collected and reviewed by Plaintiffs' experts, who are highly qualified in the field of toxicology (Dr. Rodgers), neurology (Dr. Feldman), and immunology (Dr. Broughton). Plaintiffs' experts testified regarding the established and recognized physical symptoms related to TCE exposure. Some of those symptoms are detailed by the Fourth Circuit in reviewing the facts with note taken that Plaintiffs' medical experts testified that "twenty-one of the twenty-two Plaintiffs involved in this appeal had experienced some combination of these problems" (App. 7a).

The Plaintiffs' medical experts reviewed the testing performed and the medical records of the Plaintiffs and gave their respective opinions, on the Plaintiffs they addressed, that each of the Plaintiffs, except one child, had suffered adverse health effects from their exposure to Defendant's pollution.

At the time appointed by the District Court for making dispositive motions, the Defendant filed a Motion in

Limine addressed to two of Plaintiffs' non-medical experts and a series of Motions for Summary Judgment on various issues in the case. The Defendant convinced the District Court that a grant of the Motion in Limine to exclude the testimony of Gerald Moore (hydrogeologist) and Dr. Hugh Spencer (chemical engineer) would result in Summary Judgment on all claims for all Plaintiffs, even the nuisance and trespass claims.[3] The District Court accepted Defendant's argument, granted the Motion in Limine and then granted Summary Judgment on all claims of all Plaintiffs.

The Fourth Circuit affirmed the exclusion of Mr. Moore's opinion that the contamination reached Plaintiffs' wells around 1970 and affirmed the exclusion of Dr. Spencer's back-calculations,[4] but reversed the entry of

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[3] Mr. Moore is a hydrogeologist who explained how the contamination flowed in the groundwater, passed under Slow Creek and would have reached the Plaintiffs' wells around 1970. All of Plaintiffs' experts agreed that the concentration of chemicals in the groundwater would have been higher in past years when active dumping was occurring. Dr. Spencer assumed the truth of the Defendant's assertion that there was no dumping of TCE at the plant since 1974, and using the levels of TCE found in the wells in 1987 performed half-life calculations to reach estimates of the likely range of concentrations in the past.

[4] While the Defendant has characterized the Fourth Circuit's ruling as having "*affirmed* in its entirety the District Court's exclusion of respondents' proffered expert testimony", with a ruling that Mr. Moores "opinions were 'unreliable and, therefore . . . inadmissible,' (App. 10a)" and Dr. Spencers opinions were excluded "because they had absolutely no scientific support [,] . . . were imprudent and prone to enormous error; *Id.*" (Petition at p. 5), this appears to be a much stronger juxtaposition of words from the opinion than the actual ruling stated. Mr. Moore's testimony that the contamination reached Plaintiffs

Summary Judgment. The panel was unanimous in reversing Summary Judgment on Plaintiffs' claims for nuisance and trespass. Pointing to the *average* concentration found in the Carroll well of 19.6 ppb as being nearly four times the maximum contaminant level (MCL) the majority stated, "We believe that on this evidence alone, a reasonable jury could conclude that Litton's TCE had caused those Plaintiffs who have an ownership or possessory interest in the Carroll well substantial injury or actual damages" (App. 13a). While the *average* concentrations for the other wells at issue was below the MCL,[5] the

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wells around 1970 was excluded because of an absence of specific factual evidence the Appellate Court deemed essential to the support of his opinions. The scientific methodology he utilized to formulate his opinions was not questioned by the Appellate court. As to Dr. Spencer, the Appellate Court found that Dr. Spencer failed to explain what the Court perceived to be a failure of his calculations to be born out by actual well tests and excluded his calculations. (App. 10a) In this regard see also notes 15, 17 and 18 *infra* as well as Plaintiff's Conditional Cross-Petition for Certiorari.

[5] Each of these wells in repeat sampling had *actual* measurements recorded of at least 14.3 and higher, well over the MCL. While the Appellate Court accepted Defendant's use of *average* concentrations based on all testing performed, Plaintiffs would dispute the validity of this process because of the karst geology. Also, it appears that the Appellate Court may have been under the impression that all the testing of Plaintiffs' wells occurred in the year contamination was discovered, but in fact the testing that repeatedly reflected measurable levels of TCE was conducted on a quarterly basis up through the close of the evidentiary record in 1990, which included samples taken after the Defendant had begun a remedial process designed to draw the contamination back to the plant site for treatment.

entire panel agreed there was sufficient additional evidence to prevent the entry of Summary Judgment on Plaintiffs' claims for nuisance and trespass.

The majority also found there was sufficient evidence to create a genuine issue of material fact on Plaintiffs' personal injury claims and also reversed Summary Judgment on Plaintiffs' claims for negligence, gross negligence and strict liability. Judge Williams filed a dissenting opinion on this point, expressing the opinion that without the testimony of Spencer and Moore the Plaintiffs did not have evidence of the length of time of exposure and concentrations of TCE sufficient to allow a reasonable inference that Plaintiffs' medical problems were caused by exposure to Defendant's chemicals.

The Defendant has misrepresented the consequence of the Appellate Court's ruling in two particulars: (1) the importance of Dr. Spencer's back-calculations and, (2) that without certain excluded testimony Plaintiffs are left without *any* admissible evidence to support their claims. Defendant contends that Spencer's calculations were essential to Plaintiffs' medical causation "because the actual levels of TCE measured in 1986 were not regarded even by respondent's own medical experts as high enough to cause injury" (Petition at page 4). While the Appellate Court did rule the medical experts' opinions inadmissible to the extent they relied on Spencer's calculations, there was no indication in the evidentiary record that Plaintiffs' experts considered the actual measurements too low to cause injury. Indeed, the record shows just the opposite.

Plaintiffs' experts utilized the back-calculations of Dr. Spencer and referred to them in the Joint Affidavit of Plaintiffs' experts and particularly to demonstrate the levels to which the Plaintiffs would have been exposed using the various alternative types of measures the Defendant's experts discussed in their joint affidavit to demonstrate the exaggerations used in that affidavit (AR. 752-755). But it was also clearly stated by Plaintiff's medical experts that "the actual value below which one could be chronically exposed without adverse effect is not known" (AR. 752). Additionally, the joint affidavit specifically stated:

> If Dr. Spencer's back calculations were dismissed entirely, this would not require a change in our opinions as to all plaintiffs for whom we have expressed a positive opinion on medical causation. It would, however, require another review of the information on each plaintiff to ascertain the length of time that the particular plaintiff was exposed to the well water. As we have all testified in our depositions, studies have shown adverse health effects in persons chronically exposed to drinking water with *substantially less than* 100 ppb of TCE. The actual well test results in this case have shown levels from 1 to 84 ppb. (AR. 751-52).

Clearly Plaintiffs' experts have never expressed the opinion described by the Defendant. It was the reference to another review,[6] however, that was cited by the Appellate

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[6] The reference to any reconsideration regarding causation for any Plaintiffs if the back-calculations were to be rejected entirely should have been restricted only to certain aspects of Dr. Rodgers' opinions.

With Plaintiffs' Motion to Alter or Amend Judgment under Rule 59(e) filed with the District Court on July 25, 1991, Plaintiffs' submitted an affidavit from Dr. Broughton (Immunologist)

Court (App. 7a) and led to the conclusion that Plaintiffs' could not rely on the medical causation opinions expressed for individual Plaintiffs because those opinions assumed a range of exposure based on Spencer's calculations (App. 11a). But this ruling does not render ineffective or inadmissible all other testimony by Plaintiffs' medical experts, as was specifically pointed out by the Fourth Circuit (App. 11a n. 6).

Defendant filed a Petition for Rehearing and Suggestion for Rehearing In Banc with the Fourth Circuit making basically the same argument as is being made in its Petition to this Court.[7] The Court requested an Answer to

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explaining that his medical causation opinions did not depend on *any* back calculations since his only necessary exposure information was simply whether the exposure took place before the time his tests were run on the patient's blood and did not depend on any specific levels of contaminants. Dr. Rodgers (Toxicologist) also gave an affidavit clarifying that the reservation stated in the Joint Affidavit of Plaintiffs' experts had been his because some symptoms experienced by some of the plaintiffs may presume a higher dose than the measured levels in the wells; he further stated that he had again reviewed the Plaintiffs' records and while some specific symptoms on a particular Plaintiff would move to the "possible" column from the "probable" column in his previous report, all Plaintiffs but one still had symptoms remaining in the "probable" column, even if it were assumed that the level of contaminants in the wells was never higher in the past than the levels that have actually been measured since the contamination was made public. Plaintiffs' clarification on this point (AR. 1688-98) in the Rule 59(e) motion was rejected by the trial court and the affidavits submitted with that motion were stricken from the record on motion of the Defendant. See notes 16 and 18 *infra*, however, since this is also an evidentiary matter that can be cured on remand of the case for trial.

[7] Plaintiffs also filed for Rehearing and a Conditional Suggestion for Rehearing In Banc addressed only to the exclusion of the testimony of Spencer and Moore.

be filed by Plaintiffs and a response was filed that, among other matters, pointed out examples of specific evidence in the record that was not dependant in any way on the opinions of Spencer and Moore and that would support Plaintiffs' personal injury claims.[8] On March 6, 1995, the Fourth Circuit issued its Order denying Defendant's petition and noted that "no member of this Court or the panel requested a poll on the suggestions for rehearing in banc."

REASONS FOR DENYING THE WRIT

In its effort to further prolong the appeal and delay a trial of this action, the Defendant has misrepresented both the facts of the case, the decision of the Fourth Circuit and the applicable law that required the reversal of the District Court's grant of Summary Judgment. While the Defendant would like to characterize the reversal of Summary Judgment as some kind of aberrant "secret law" issued by the Fourth Circuit solely to inflict an injustice on this Defendant and in conflict with the decision of this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), the reality is that the Defendant prevailed on the only *Daubert* issues presented in this case, with the exclusion of certain evidence affirmed, but simply was not entitled to Summary Judgment because other admissible evidence created issues of fact that will require resolution by the jury.

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[8] See text pages 17-20 *infra* for a detailed sampling of admissible evidence remaining to support Plaintiffs' claims that the Defendant's pollution caused them personal injury.

The real question the Defendant is asking this Court to review is whether there was sufficient evidence remaining in the record, in the form of admissible expert testimony together with both direct and circumstantial evidence to create a genuine issue of fact upon which reasonable men might differ in determining the ultimate issues in dispute in this case. The Appellate panel found that there was, and in keeping with very well established Fourth Circuit authority, reversed the Summary Judgment. Since the panel determined there was no precedential value in applying well established principles to the reversal of an improper grant of Summary Judgment, the decision was not designated for publication. The Defendant then made basically the same argument being made to this Court in its Petition for Rehearing and Suggestion for Hearing In Banc. Not one judge in the Fourth Circuit, including the author of the dissenting opinion, considered the Defendant's argument to raise any important issues that merited a hearing.

The Defendant has attempted to create a conflict with *Daubert* where there is none, and an intra-circuit conflict with Fourth Circuit precedent where there clearly is none. There are no important issues presented by the Defendant that warrants review by this Court. This is a very fact-based appeal wherein the Defendant is asking the Supreme Court to review a record that is not even fully developed to assess the sufficiency of evidence to overcome summary judgment in a case that is of no great importance to anyone but the party litigants. This is not the role of the United States Supreme Court. "We do not grant a certiorari to review evidence and discuss specific fact." *United States v. Johnston*, 268 U.S. 220, 227 (1925). As

Justice Stewart stated in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959):

> to review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems . . . not only to disregard the Court's proper function, but to deflect the Court's energies from the mass of important and difficult business properly here. *Id.* at 111.

The Defendant/Petitioner has shown no reason why this case has any greater importance than any other personal injury case or why the Supreme Court should concern itself with a review of the evidence to determine whether the Fourth Circuit was correct to reverse a summary judgment.

THERE IS NO CONFLICT WITH *DAUBERT*

There is no conflict between the Fourth Circuit's reversal of Summary Judgment and the decisions of this Court. There is neither a direct or even an apparent conflict with the Fourth Circuit's ruling and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). *Daubert* was addressed to the proposed standard by which a trial court is to determine the admissibility of expert witness testimony. The Defendant *prevailed* in having the grant of its Motion in Limine affirmed. The Fourth Circuit ruled Mr. Moore's testimony inadmissible as unreliable because he did not have evidence of factual matters upon which his opinion was based.[9] The Court determined that one of Mr. Moore's

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[9] The basis for finding Mr. Moore's testimony unreliable was clearly not because he used an unacceptable methodology. Moore

assumptions related to the conditions under which groundwater could pass under Slow Creek was that the water levels in the wells dropped below the level of Slow Creek "as a result of little rainfall or heavy well usage," but that "he had no evidence of such a low water level in the wells around 1970" (App. 10a). The Fourth Circuit, therefore, excluded his testimony.[10] The Fourth Circuit then reviewed Dr. Spencer's testimony and excluded his back-calculations for estimates of past TCE concentrations in Plaintiffs' wells. The Fourth Circuit further ruled that Plaintiffs could not rely on the opinions of their three medical experts that the Plaintiffs' medical problems were caused by Litton's TCE, because they had relied on Dr. Rodgers estimates of exposures, which in turn were based on Spencer's calculations. The criterion in *Daubert* was stated by the Court as the test for admissibility of expert testimony (App. 9a) and the issues on admissibility of evidence in this case clearly were decided in the Defendant's favor and challenged testimony was excluded.[11]

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used the exact same methodology and even the exact same calculations as the Defendant's hydrogeologist with only two assumed factors in the equations being different, which led them to different conclusions. (This is discussed more fully with references to the record in Plaintiffs' Conditional Cross-Petition for Certiorari.)

[10] This is a curable defect in the evidentiary record for this expert's testimony to be rehabilitated on remand and Plaintiffs' have already filed a Motion to Supplement the Record in the District Court in *Ramsey* and in *Carroll* on remand to file, among other things, the annual rainfall data from the United States Weather Service.

[11] As noted in the decision, however, the exclusion of a portion of the medical expert's opinions did not render the remainder of their testimony inadmissible regarding the illnesses suffered by these Plaintiffs and the health problems known to be caused by TCE (App. 11a n. 6).

While the Plaintiffs dispute the correctness of the Court's ruling,[12] the Defendant most certainly is not in a position to assert that *Daubert* was not followed in assessing the admissibility of expert opinions.

The Defendant is attempting to create a conflict by stretching this Court's decision in *Daubert* into a case that establishes some type of *requirement* that a very specific type of expert testimony be presented in every disputed personal injury case before there is sufficient evidence that would allow a jury to decide the ultimate issue of whether a defendant's wrongdoing caused injury to a plaintiff. *Daubert* sets no such standard. *Daubert* is addressed to the admissibility of expert testimony, not the sufficiency of evidence required to overcome Summary Judgment in a personal injury case.

In fact the Fourth Circuit's majority review of the remaining record, based on *admissible* expert testimony and both direct and circumstantial evidence to determine whether Plaintiffs presented sufficient evidence to create a genuine issue of material fact is fully consistent with the Supreme Court precedent cited and followed by the Fourth Circuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (the trial court must deny a motion for summary judgment if there is circumstantial evidence from which a jury could infer the existence of certain facts). Likewise, the Fourth Circuit's decision is fully consistent with Supreme Court precedent for determining the sufficiency of the evidence. In *Galloway v. United*

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[12] See Plaintiffs' Conditional Cross-Petition filed July 10, 1995.

States, 319 U.S. 372 (1943) this Court addressed the "standards of proof" judges require for submission of evidence to the jury, and stated:

> . . . Standards . . . cannot be formed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular case situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, *after making due allowance for all reasonably possible inferences favoring the party whose case is attacked*. *Id.* at 395 (emphasis added).

There simply is no conflict with any decisions of this Court.

THERE IS NO CONFLICT WITH FOURTH CIRCUIT PRECEDENT

Defendant accuses the Fourth Circuit of issuing its decision as a non-published opinion so that it could create "secret law" for the benefit of the Plaintiffs, and to avoid dealing with what Defendant contends is a conflict with established Fourth Circuit precedent.[13] The reversal

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[13] If the Defendant truly believed the Fourth Circuit had such motivations, then why did it not file with its Motion for Rehearing a motion to publish the opinion as is provided in the Fourth Circuit's Internal Operating Procedure 36.5 (App. 240a)

of Summary Judgment in this case is consistent with Supreme Court precedent cited above (and specifically cited by the Fourth Circuit at App. 12a), as well as with Fourth Circuit decisions, and with North Carolina law. As this Court instructed in *Anderson v. Liberty Lobby, Inc., supra,* the Fourth Circuit has also instructed the District Courts that when a Motion for Summary Judgment is considered:

> The facts themselves, *and the inferences to be drawn from the underlying facts,* must be viewed in the light most favorable to plaintiff, as the party opposing the motion.

Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) (emphasis added). Moreover, the majority's opinion is fully consistent with the fact that:

> The non-moving party is in a favorable posture, being entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, *the most favorable of possible alternative inferences from it drawn in his behalf;* and finally, to be given the benefit of all

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and state in that motion that the opinion alters or modifies existing law within the Circuit and therefore warrants publication under I.O.P. 36.4.i.?

The Defendant is asking the Supreme Court to take extraordinary action to exercise supervisory powers over the Fourth Circuit when the Defendant did not even take advantage of the direct remedy it had available under the internal Operating Procedures of the Fourth Circuit.

> favorable legal theories invoked by the evidence as is considered." *Id.*

It is well-established that facts may be proven by circumstantial evidence, including facts supporting medical causation. *Roehling v. National Gypsum Co. Gold Bond Bldg. Prods.*, 786 F.2d 1225 (4th Cir. 1986). In *Roehling*, the plaintiff brought a products liability action against manufacturers of asbestos products to which he had been exposed in the workplace. The District Court entered summary judgment, and on appeal the Fourth Circuit held that the plaintiffs' exposure to asbestos and the resulting injuries were sufficiently provable such that:

> The evidence, *circumstantial as it may be*, need only establish that Roehling was in the same vicinity as witnesses who can identify the products causing the asbestos dust that all people in that area, not just the product handlers, inhaled. *This case includes such evidence and a jury can reasonably infer therefrom that plaintiff was injured by defendants' products.*

Roehling, 786 F.2d at 1228. *Accord Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1464 (6th Cir. 1993). *See also Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973). Thus, despite defendant's assertion that Fourth Circuit precedent does not provide relief for the plaintiffs based on the remaining admissible evidence as the majority panel ruled, the law is clear that where exposure to hazardous substances is established as in this case, a jury can reasonably infer that a plaintiff's injuries were caused from that exposure. *Roehling*, at 1228. *See also Thomas v. Morgan*, 136 S.E.2d 700, 702 (N.C. 1964) ("Evidence sufficient to make out a case may be circumstantial,

or it may be direct, or it may be a combination of both."); *Drum v. Bisaner*, 113 S.E.2d 560, 564 (N.C. 1960) (negligence can be inferred from facts and attendant circumstances). *See also Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1957), *cert. denied*, 358 U.S. 908 (1958) (a jury's permissible inferences must be within the range of reasonable probability) *cited with approval by Dillon v. Fibreboard Corp.*, 919 F.2d 1488 (10th Cir. 1990); *Drum*, 113 S.E.2d at 564 (if the facts proved establish the more reasonable probability that the defendant is negligent, the case must go to the jury).

A sampling of the admissible evidence in this record, without reliance on any of the opinions of Moore or Spencer, establishes the following:

1. The plant was built in 1967 and used and disposed of TCE at the plant cite from 1967 through 1974. The defendant did not test the groundwater for the effects of its disposal practices until 1986 (plant wells only) and January 1987 (community wells tested for the first time).

2. Despite the fact the defendant had not used TCE since 1974 it was found in each of the wells at issue in this case, from the first testing in 1987 and with numerous subsequent measurements above the maximum contaminant level (MCL) established by the EPA for drinking water supplies.

3. The Carroll well (well C-2) was dug in 1969 and was the water source for all Plaintiffs until 1986, when the Green and Messer wells were dug. Contamination was discovered in January, 1987 in all three wells and

notices were issued by the Health Department not to drink the water from any of these wells.

4. Plaintiffs' medical experts established that health complaints experienced by twenty-one of the twenty-two Plaintiffs were known to be caused by TCE. These effects began to appear in Plaintiffs' medical records in the early to middle 1970's.

5. Only Johnathan Messer (a minor) had not experienced health complaints known to be caused by TCE and he had less exposure to the water in the residential wells than any other Plaintiff.

6. Dr. Rodgers illustrates very vividly in paragraph 6 of his affidavit that when the Plaintiffs are listed in order by the length of time they were drinking from these wells, with a listing of the symptoms experienced by that Plaintiff that are known to be caused by exposure to TCE, it is readily apparent that those Plaintiffs who have had the longest exposure to the well water also exhibited more of the health complaints known to be caused by TCE (AR. 836-39).

7. Plaintiffs' medical experts found this to be one of the best documented cases of TCE exposure they had seen, both as to the presence of TCE documented in repetitive well testing and as to the symptoms of TCE exposure documented in the Plaintiffs' medical records after they began drinking from the wells. (AR. 755).

8. Admissible expert testimony shows that it is well-established that TCE is a known neurotoxin, meaning it is toxic to nerve tissue. Plaintiffs' experts explained that one of the ways TCE does damage to nerves is to

damage the myelin sheath, which is a particular type of tissue on the outside of peripheral nerves. (AR. 818) Dr. Broughton tested the blood of the adult Plaintiffs and found 87% of them to be positive for anti-myelin autoantibodies, which he states is evidence of injury to myelin tissue in the individuals tested, and that the high incidence of positive results was typical of toxic chemical exposures (AR. 793-797) Many of these Plaintiffs had documented in their medical records beginning after 1970, and repeatedly noted over the years, neurological symptoms of numbness and tingling in their extremities and several had complained of facial numbness or a sensation like ants crawling on one side of their face or head. Dr. Feldman testified about the sensitivity of the Fifth cranial nerve to damage from TCE exposure. Electrodiagnostic tests of the "blink reflex" of ten adult Plaintiffs were also examined by Dr. Feldman. Some Plaintiffs also had abnormal EMG results reported as well. Dr. Feldman explained how the demyelinization of a nerve impedes the ability of the nerve to conduct an impulse that would result in the type of changes found in the electrodiagnostic studies conducted on these Plaintiffs. (AR. 814-25).[14]

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[14] The defendant, of course, produced experts who offered contrary opinions as to proper interpretations and significance of the laboratory blood tests performed by Dr. Broughten and electrodiagnostic studies relied on by Dr. Feldman. These are all standard diagnostic procedures and testing methods of a type that are familiar to, utilized, and/or performed by Defendant's own experts as well, but Defendant's experts simply disagree with the conclusions Plaintiffs' experts reached in considering the results of the testing performed. This kind of dispute among experts is the traditional grist for the mill of fact finding for which a jury is impaneled.

9. Admissible expert evidence also shows that, because it is a neurotoxin, TCE is also capable of causing brain damage. Three of five Plaintiffs who underwent Neuropsychological testing demonstrated abnormalities of brain functioning. (AR. 821) Dr. Roberta White, a neuropsychologist experienced in the study of TCE exposures, reviewed these reports and on two Plaintiffs she could not say the noted damage was caused by TCE because of other variables that would affect her opinion, but as to the third she found his abnormalities to be the specific type of damage seen with TCE exposure (AR. 3311-15).

10. In their joint affidavit Plaintiffs' medical experts stated the clearly admissible opinion that "As we have all testified in our depositions, studies have shown adverse health effects in persons chronically exposed to drinking water with *substantially less than* 100 ppb of TCE. The actual well test results in this case have shown levels from 1 to 84 ppb." (AR. 752) (emphasis added).

11. Plaintiffs' medical experts also performed a differential diagnosis as to each Plaintiff based on their medical records (AR. 757-58) and also considered the differential diagnoses put forward by Litton's expert (AR. 758-59) and concluded that other causes for the complaints on specific individuals for specific complaints could be ruled out to a reasonable degree of medical certainty (AR. 759).

With just this sampling of the admissible evidence on the record the Fourth Circuit was justified in finding the evidence sufficient to create a genuine issue of disputed fact for a jury to determine whether the Defendant's

chemicals caused injury to the Plaintiffs. Certainly the Defendant cannot demonstrate a basis for asking the Supreme Court to exercise its extraordinary power to review the sufficiency of evidence in a personal injury case because the Fourth Circuit's reversals of Summary Judgment is "so totally devoid of evidentiary support as to render . . . [the decision] . . . unconstitutional under the Due Process Clause of the Fourteenth Amendment," *Garner v. Louisiana*, 368 U.S. 157, 163 (1961). No such showing has been made by the Defendant, nor can there be on this record.

Even if the Defendant truly had a basis for the arguments urged in its Petition for Certiorari, a review at this point in the litigation would be premature, since the record as it stands is not fully developed on key issues. Additional affidavits were presented in the trial court from four experts that were either not considered,[15] or were

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[15] At the time Plaintiffs' filed their Objections to the Findings of Fact, Conclusions of Law and Recommendations of the Magistrate, Plaintiffs' submitted an affidavit from Dr. Roger L. Olsen, a geochemist who had been named by Plaintiffs and deposed by Defendant as an expert in the companion case of *Ramsey v. Litton*. Because of the different time tracks the cases were on, these events took place after the time for including Dr. Olsen's opinions in the Plaintiffs original Response to Defendant's Summary Judgment. An affidavit from Dr. Olsen (AR 1517-18) was filed with Plaintiffs' objections to the Findings, Conclusions and Recommendations of the Magistrate and at a stage in the proceedings in which the District Court was to hear the matter *de novo*. Although oral argument was requested before Judge Vorhees, this was denied and the affidavit of Dr. Olsen was never addressed by either the District Court or the Appellate Court. Dr. Olsen is a Ph.D. in Geochemistry, has been involved in site clean-up evaluations involving chlorinated

stricken from the record[16] that would have a bearing on issues about which the Defendant is now complaining. While the Defendant may argue that the District Court was originally justified in ignoring the subsequently filed documents in the orderly management of its docket, it should be remembered that the Fourth Circuit has reversed the entry of Summary Judgment and remanded this case for trial. The mandate has issued to the District Court and the Defendant has made no motion to stay the mandate. Evidentiary considerations are always subject to further review as testimony is offered for trial, especially in view of additional factual information that was not available at the time Summary Judgment was being considered. *Byrd v. Blue Ridge Rural Electric Cooperation,* 356 U.S. 525, 540 (1958), cited in *Gomez v. Wilson,* 477 F.2d 411, 417 (D.C. Cir. 1973).[17] It would certainly not be

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hydrocarbons in ground water at over 20 sites, 10 sites involving TCE, (AR. 1532) and has presented or published 6 papers on subjects directly relating to TCE in ground water systems and the prediction of the fate and transport of TCE in ground water (AR. 1517). In his affidavit, Dr. Olsen stated that the reports of both Spencer and Moore were prepared by use of standard methodology and the same type of analysis and calculations are carried out routinely in the field during environmental assessments and cleanup, and specifically the same analysis performed by Moore would be required of the Defendant's to comply with the terms of the Consent Order.

[16] See note 6 *supra* regarding affidavits from Plaintiffs' medical experts that were stricken at the time Plaintiffs' Rule 59(e) Motion was denied as not having been timely filed for consideration of the Summary Judgment, the content of which the same experts would be expected to testify at trial.

[17] As noted in the affidavit of Dr. Olsen discussed in note 15 above, the Defendant was required under the consent order with the EPA to make the same type of analysis as Mr. Moore

appropriate for the Supreme Court to consider issues raised in a case on a record that is being supplemented on remand from the Fourth Circuit even as the Petition for Certiorari is pending decision.[18] If the Supreme Court is going to engage in a review of the facts of an individual case to determine the sufficiency of the evidence to support a claim, then such a review should at least be conducted on a fully developed record.

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performed for the Plaintiffs. The hydrogeologist Defendant used for purposes of litigation, Dr. Wallace, was not involved in the activities of the Remedial Action or the reporting to the EPA under the Consent Order. The hydrogeologists and engineers charged with making these reports to the EPA were not named as Rule 26 experts by the Defendant and at the time they were made available for deposition under the time allotted for fact discovery to be completed, they stated they had no opinions about whether the contamination crossed Slow Creek and had not yet been asked by the Defendant to make that analysis. Reports that were required to characterize the nature and extent of the pollution were subsequently filed with the EPA *after* Plaintiffs' case had been dismissed with maps clearly showing that the contamination crossed the creek. These reports as well as a resubmission of Dr. Olsen's affidavit are the subject of a Motion presently pending in the District Court on remand to supplement the evidentiary record. See note 18 *infra*.

[18] On remand this case was reassigned to the Honorable Lacy Thornburg who held a status conference on July 7, 1995, in which he lifted the stay on the *Hembree* and *Ramsey* cases, indicated his inclination to consolidate the three cases for trial and ordered that all motions to supplement the record on any pending motions in any of the cases, or any other motions to be filed by either party be filed by July 17, 1995. In the course of these filings, including a motion to consolidate filed by Plaintiffs, the affidavits of 1991 that were stricken from the record, the affidavit of 1990 from Dr. Olsen, and factual evidence such as rainfall data from the National Weather Service have been refiled for the record and are now properly before the trial court for consideration.

C. THERE IS NO NEED FOR AN EXERCISE OF THE SUPERVISORY POWERS OF THE SUPREME COURT

Defendant has petitioned this Court to exercise its power of supervision over the Federal Courts to correct a perceived wrong done to this Defendant and the judicial system by the failure of the Fourth Circuit to designate its decision for publication. Defendant's argument is based entirely on its own perception that the Fourth Circuit failed to follow its own precedent. The Defendant has charged that

> . . . a single panel's unbridled discretion to disregard the published precedents of the Circuit in which it sits, by means of issuing an unpublished decision, is inconsistent with the very concept of ordered justice. (Petition at p. 15).

Such dramatic language is no doubt an effort to create an issue that appears to be of sufficient importance to justify a request for Supreme Court review, but totally ignores the fact that no judge for the entire Fourth Circuit Court of Appeals, including the author of the dissenting opinion, saw a need for supervision over this panel's "unbridled discretion to disregard the published precedents of the Circuit" by reviewing its decision in banc. If there were indeed a failure to follow Fourth Circuit precedent, surely at least one judge sitting in the Circuit would have requested a poll on Defendant's suggestion for rehearing in banc. Apparently, the Defendant believes the judiciary of the entire Fourth Circuit has conspired to issue "secret law" just to deprive this particular Defendant of the Summary Judgment granted to it by the District Court. Defendant is attempting to avoid the much more obvious reasons the decision was not designated

for publication.[19] Additionally, a much more plausible explanation for why no judge in the Fourth Circuit requested a poll on Defendant's suggestion for in banc hearing on these same issues is because there is, indeed, no intra-circuit conflict and no failure of the Fourth Circuit to follow its own precedent.[20]

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[19] The standards for publication are set forth in Rule 36.4 of the Internal Operating Procedures of the Fourth Circuit, (App. 239a-240a) and specifies that an opinion will be published *only* if the opinion satisfies one or more of the following standards:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
ii. It involves a legal issue of continuing public interest; or
iii. It criticizes existing law; or
iv. It contains a historical review of a legal rule that is not duplicative; or
v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

Since the opinion was based on well-established principles for reviewing an appeal from a grant of summary judgment there was no reason for publication.

[20] As addressed previously, the supposed conflict with other Fourth Circuit cases is non-existent. The specific cases relied on so heavily by the Defendant are clearly not in conflict or are readily distinguishable. In *Rohrbough v. Wyeth Laboratories*, 916 F.2d 970 (4th Cir. 1990) there was no medical testimony the vaccine at issue caused the reaction complained of in *any* persons. Plaintiff's experts in that case offered only hypothesis for possible mechanisms by which injury could occur. *Id.* at 974. *Fitzgerald v. Manning*, 679 F.2d 341 (1982) is a medical malpractice case arising from a series of operations and post-operative infections, and involved issues of concurring causes of injury. Id. at 348. Likewise, the Defendant's attempt to create a conflict with a *subsequent* Fourth Circuit decision with citation to *In re*

Even if there were an intra-circuit conflict, this is not a sufficient basis for granting a writ of certiorari. See *Davis v. United States*, 417 U.S. 333, 340 (1974). It has long been the position of the Supreme Court that "it is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 907 (1957) (rejecting a certificate from a court of appeals involving conflicting decisions by different panels).

Neither does the Defendant's attack on the publication policy of the Fourth Circuit warrant review by the Supreme Court. The rendering of an opinion through an unpublished decision is not an unusual practice. Beginning in 1964, the Judicial Conference, composed of federal judges and court officers, sought to formulate a plan to alleviate the labor and monetary costs associated with published opinions.[21] The plan was formulated by 1973,

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Wildewood Litigation, 52 F.3d 499 (4th Cir. 1995) is obviously written to imply that the Fourth Circuit found TCE levels in residential wells above the MCL to be insufficient evidence in that case to support a nuisance claim (Petition at p. 18 n. 27). There is no such ruling and, in detailing the facts of the case, the court notes that,

> TCE levels on some of the owner's properties and in the lake fall within a range near or above EPA and DHEC drinking water contamination levels. *The drinking water of the plaintiffs, however, is not contaminated by the TCE at issue here. Id.* at 501 (emphasis added).

[21] In addressing the Ninth Circuit Judicial Conference regarding formulating rules for unpublished opinions, John P. Frank noted that since 1960 until the time of his speech in 1977, "the number of cases in the courts of appeal has risen from approximately 4,000 to 16,000." John P. Frank, *Remarks Before the Ninth Circuit Judicial Conference*, The Judges Journal, Winter 1977 at 10.

when the Judicial Conference announced its official policy of limiting publication. Committee on Use of Appellate Court Energies, Advisory Council for Appellate Justice (1973) *Standards for Publication of Judicial Opinions*, FJC Research Series No. 73-2.

The Honorable Phillip Nichols, Jr. has stated quite succinctly the very pragmatic reasons for non-publication, reasons that would apply to the Fourth Circuit's decision in this case, when he stated:

> The true reason behind the selective publication policy is that it is wrong to ask publishers to publish, libraries to collect, and scholars to read opinions that merely labor the obvious, so far as they deal with the law at all, rehashing conclusions already reached in authoritative decisions of the same court or of the Supreme Court. Nichols, *Selective Publication of Opinions: One Judge's View, 35 Am. U. L. Rev.* 909, 913 (1985).

This Court's supervisory review of the Fourth Circuit's limited publication rule is unwarranted. Decisions regarding the efficacy of publication plans are best left to the Judicial Conference, an organization that has spent years studying the problems of publication of opinions, and is not a matter that warrants review by the Supreme Court. *See Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 259 n.1 (1978) (reached jurisdictional issue in habeas corpus matter while expressly declining to consider the 7th Circuit's unpublished opinion rule).

CONCLUSION

The Defendant has shown no basis for review by this Court. There is no conflict with Supreme Court precedent, or Fourth Circuit precedent and no necessity for the exercise of this Court's supervisory powers. The Defendant is in actuality asking this court to review the suffiency of evidence to overcome Summary Judgment in a personal injury case. Defendant's petition should be denied.

Respectfully submitted,

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